No. 13,078

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

ROGER N. LIBBEY,
Appellee.

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

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Appellee's brief calls for a little comment.

The first point we made was that appellee was not an "employee" within the meaning of the Federal Employers' Liability Act. The only response is an understatement, resulting, in effect, in a misstatement, of the facts and the citation of some cases, all of which were dealt with in our brief except *Haluttzok v. Gt. N. Ry Co.,* 55 Minn. 446, 57 N.W. 144. That case was not under the Federal Employers' Liability Act. It was not one of liability to a servant for injury. It was the case of a volunteer, at the time actually doing defendant's work,—handling a hand truck to carry freight. The case was put on the ground of an actual em-

ployment of an assistant by a servant of the defendant under an implied authority. Whatever else need be said on this point will be found in our opening brief.

In connection with this subject we urged error in the exclusion of evidence. The only attempted answer is to say that the agreement offered was void under the Federal Employers' Liability Act. The proposition can be made only if it first be assumed that appellee was an employee. The argument is a circle. It first assumes the answer to the question and then justifies the answer on the basis of its own assumption. Whether the agreement, as such, was void or not is beside the point. It was not offered for the purpose of having it enforced. It was offered solely for the purpose of showing the relationship of the parties. However void an agreement may be its recital can still be evidence of a fact. The firemen's agreement was offered for the same purpose. The comments made fail to meet the proposition that when the question is one of relationship of the parties, either side is entitled to show all of the relevant circumstances, whether they bear on the relationship directly or are simply ground for an inference.

On the matter of interstate commerce one or two comments must be made. It is said the locomotive from which appellee jumped was to go out on the "Bowman turn" and that this train handled cars loaded with freight to travel in all directions and thus go out of the state of California. The simple answer is that there was no such showing. The showing was that on the Bowman turn cars were delivered and other cars were picked up; that some of the cars contained perishables. **Nothing more is shown** except that Roseville, for some unidentified cars, was a junction point from which interstate trains left and into which they came. Appellee was not shown to have ever had any connection with any

such trains or any cars or any equipment moving in interstate commerce or handling any such trains. Certainly nothing he did was in furtherance of any such business. Nor did it "directly or closely and substantially, affect" any such activity.

It is not questioned that appellee would not have come under the Federal Employers' Liability Act prior to the amendment in 1939. No serious attempt is made to show why, for his case, the amendment made any change. Certainly no case has been decided under the amendment which remotely approaches this one. If the Court wants to examine the cases they will be found collected in an extensive note in 10 A.L.R.2d 1279. They all have to do with men actively engaged in handling the equipment, repairing the equipment, working on the right of way, working on permanent structures and the like, all of which were used, in part at least, for interstate transportation.

Before the 1939 amendment it had been established definitely that interstate commerce under the Act was interstate **transportation** or work so closely related to it as to be practically a part of it. (*Shanks v. Delaware etc. Co.,* 239 U.S. 556, 60 L.ed. 436; *I. A. C. v. Davis,* 259 U.S. 182, 66 L.ed. 888; *Chicago etc. Co. v. Bolle,* 284 U.S. 74, 76 L.ed. 173; *Chicago etc. Co. v. Ind. Com'n,* 284 U.S. 296, 76 L.ed. 304; *New York etc. Co. v. Bezue,* 284 U.S. 415, 76 L.ed. 370.) The 1939 amendment did not disturb the portion of the Act under which these cases were decided; to the contrary it re-enacted it. In doing so Congress had in mind the construction already given (*Overstreet v. North Shore Corp.,* 318 U.S. 125, 131, 87 L.ed. 656, 652; *United States v. C. I. O.,* 335 U.S. 106, 112, 92 L.ed. 1849, 1856; *Francis v. S. P. Co.,* 333 U.S. 445, 449, 92 L.ed. 798, 803). Indeed, as the *Overstreet*

Case holds, when Congress used the term "interstate commerce" in the Fair Labor Standards Act, it did so with knowledge of the definition given in the cases of the Federal Employers' Liability Act, and used the term as so defined. *A fortiorari* this is true of the Federal Employers' Liability Act itself when it was re-enacted without change.

Interstate commerce is still interstate **transportation** for work so closely related to it as to be practically a part of it. Nothing that appellee did came within this. By the 1939 amendment the Act was extended to work which furthered interstate commerce. But nothing which appellee was doing furthered any interstate transportation. He was preparing himself to work as a fireman. What he might do in the future might further interstate transportation. But what he was doing at the moment did not. Nor did it affect interstate transportation "directly or closely and substantially." It is interesting to notice that these words were not in the amendment as originally proposed. Originally the amendment was to cover any employee whose work "in any way" affected interstate transportation. In the course of adoption the language was changed by substituting "in any way **directly or closely and substantially.**" (See *Ermin v. Penn. R. Co.,* 36 F. Supp. 936, 938 (E.D.N.Y.)) The words were introduced as a definite limitation and they must be given the effect intended by Congress.

It is submitted that in this case no more was shown than was shown in *Shoenfelt v. Penn. R. Co.,* 69 F. Supp. 728 (S.D.N.Y.); *Hallaway v. Thompson,* 148 Tex. 471, 226 S.W. 2d 816; or *Thompson v. Ind. Com'n,* 380 Ill. 386, 44 N.E.2d 19, cert. den. 318 U.S. 755, 87 L.ed. 1129. *Holl v. So. Pac. Co.,* 71 F. Supp. 21 (N.D. Cal.) pointed out that the line dividing employees of a railroad who fall under the Act

and who do not fall under the Act had been moved by the 1939 amendment, but the line must still be drawn. All employees do not fall within the Act.

The three cases cited by appellee call for a little comment. *Shelton v. Thomson,* 148 F.2d 1 (Circ. 7) was treated by the Court as the case of an employee repairing cars,—he was a crane operator "who is engaged in the process of repairing cars." *Edwards v. B. & O. R. Co.,* 131 F.2d 366 (Circ. 7) was another case of repairing equipment. *Kach v. Monessen etc. Co.,* 171 F.2d 400 (Circ. 3), was a case of a member of a switching crew, one of the very classes specifically designated for inclusion in the Senate Committee Report dealing with the 1939 amendment (see *So. Pac. Co. v. I. A. C.,* 19 C.2d 271, 120 P.2d 880).

We argued that it was a question which should have been submitted to the jury whether, if appellee were an employee he had so far departed from the course and scope of his employment as no longer to be entitled to the benefits of the Act. The attempted reply calls for little comment. It is an argument which properly could be addressed to a jury. It suggests interpretations of the evidence and suggests things which might be found as a matter of fact. There is nothing in it to support a ruling that as matter of law appellee had not departed from the course and scope of his assumed employment and had not departed from his instructions. The matter is covered in our brief.

On the issue of fraud we pointed out that the Court erred in excluding evidence which went to the matter of reliance and materiality of the misrepresentation. It is no answer that the instructions of the Court were correct. Nor is it an answer that the matter was submitted to the jury. These things can always be said when evidence is improperly

excluded. A party is entitled to have his case submitted to the jury with all of the evidence that properly should be before it. There is no attempt to meet the showing made in our brief that evidence such as was offered from the doctor and was excluded is proper, material and relevant.

On the matter of the amount of damages there can be added to the collections of cases referred to on page 60 of our brief the note in 16 A.L.R. 2d 3ff especially at 249.

Only one or two comments on the attempted reply are called for. It is wholly inadmissible to use a figure of $300 per month as a basis of earnings for appellee. This was before appellee went into civilian service and includes bonuses for overseas pay in hostile waters. It is equally inadmissible to use the figure of $190 a month. Whether appellee's incapacity is permanent or not, it certainly is not total. On the very figures used, even if his incapacity could be said to be 50 per cent as a result of this accident and because of injury to his legs (ignoring for the moment the contributing factor of the injury to his other leg) in percentages it certainly could not exceed 50 per cent. There is no disability except in the legs. The upper extremities have all their original usefulness. On appellee's own figures there is a demonstration that the award is double what it should have been.

It is respectfully submitted that the judgment should be reversed.

Dated at San Francisco, California, December 24, 1951.

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